NO. 80-5060

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

LONNIE JOE CARTER — PETITIONER

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Table of Authorities	i
Counterstatement of the Question Presented	1
Opinion Below	1
Constitutional and Statutory Provisions Involved	1
Jurisdiction	1
Counterstatement of the Case	1 - 3
Reasons for Not Granting the Writ	3 - 5
Conclusion	5
Proof of Service	6

TABLE OF AUTHORITIES

Cases:

Bruno v. United States, 308 U.S. 287 (1939)	3, 4, 5
Green v. Commonwealth, Ky., 488 S.W.2d 339 (1979)	3
Griffin v. California, 380 U.S. 609 (1965)	3, 4, 5
Lakeside v. Oregon, 435 U.S. 333 (1978)	3, 4, 5

Federal Statute:

28 U.S.C. 1257(3)	1.

Other Authorities:

Kentucky Revised Statute 421.225	3, 4

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether it is a denial of Fifth and Fourteenth Amendment rights for a state court in a criminal case to refuse to instruct the jury that the defendant is not compelled to testify.

OPINION BELOW

The opinion below from the Supreme Court of Kentucky is styled Lonnie Joe Carter v. Commonwealth of Kentucky. It is a memorandum opinion per curiam, is unpublished and dated May 13, 1980. The opinion of the Kentucky Supreme Court is correctly set out in the appendix of the petitioner's petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has correctly set forth in his brief all of the constitutional and statutory provisions needed to resolve the issues presented.

JURISDICTION

Petitioner's application for a writ of certiorari complies with the prerequisites of 28 U.S.C. 1257(3). The petitioner, however, has failed to demonstrate a conflict between the decision of the Kentucky Supreme Court and any provisions of the United States Constitution or decisions of this Court so as to warrant a review of the decision of the Kentucky Supreme Court. Accordingly, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Respondent accepts as being substantially correct the procedural history and the material facts as presented in the petition. Certain aspects of the underlying facts, however, need emphasis or clarification.

Petitioner was found guilty after a jury trial of third degree burglary and was sentenced to two years. In a second

phase of the trial he was found guilty of being a persistent felony offender and sentenced to twenty years' imprisonment.

Officer Elliston of the Hopkinsville Police Department was on patrol on December 22, 1978, at approximately 1:50 a.m., in downtown Hopkinsville. She observed two black males along the side of a building in an alley. When they saw the officer, the individuals began running. When the officer maneuvered her cruiser down the alley, she saw a hole had been knocked in the side of a building housing Young's Hardware. There were two coats lying at the scene of the crime and some other items which she believed came from the store

Officer Elliston gave out a call on the police radio that there were two black males in the alley behind Young's Hardware running towards Fifth Street in Hopkinsville. Officer Leroy Davis gave chase and finally stopped petitioner. Petitioner had items in his hand which he dropped during the chase. These items included a bag and a police radio scanner set at the local police channel.

The items found outside of the hole in the wall of the building housing Young's Hardware were identified as having come from Young's Hardware. Petitioner was taken to the police station and advised of his "rights." He originally indicated he did not want to make a statement, but later stated that he was by himself during the commission of the crime and that coats found at the scene belonged to him.

During the trial on the burglary charge petitioner was advised that if he should take the stand his prior felony convictions would be brought up for impeachment purposes. Petitioner chose not to take the stand.

Counsel for petitioner requested that the court give the jury an instruction to the effect that the defendant is not compelled to testify. This requested instruction was refused by the court. Counsel for petitioner, however, did explain to the jury that petitioner did not take the stand and testify because he was not required to. Counsel for petitioner further noted that his client does not have to do anything.

After conviction petitioner appealed to the Kentucky Supreme Court. Petitioner's appeal complained of some nine different allegations of error, including the one issue presented to this court on the petition for certiorari. The Kentucky Supreme Court ruled that each of the allegations of error was without merit and affirmed the lower court judgment. In concluding that the trial court did not commit error by refusing an instruction to the jury regarding petitioner's right not to testify, the Kentucky Supreme Court pointed to Kentucky Revised Statute 421.225, which provides:

> "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him." [Emphasis added].

The Kentucky Supreme Court in a prior decision of Green v. Commonwealth, Ky., 488 S.W.2d 339 (1979), had ruled that it was not error to refuse an instruction submitted by a defendant concerning the defendant's right not to testify. In petitioner's appeal, the Kentucky Supreme Court reaffirmed its decision in Green v. Commonwealth, Supra.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

ARGUMENT

There does not exist a conflict between the decisions of this court and the Kentucky Supreme Court concerning an instruction regarding a defendant's right not to testify.

Petitioner primarily relies upon three decisions by this Court for his position that the decision of the Kentucky Supreme Court should be reviewed. Bruno v. United States, 308 U.S. 287 (1939); Griffin v. California, 380 U.S. 609 (1965); and Lakeside v. Oregon, 435 U.S. 333 (1978). The rationale in these three decisions does not conflict with the rationale of the Kentucky Supreme Court in such manner as to require review of the Kentucky Decision.

In Bruno v. United States, Supra, the court had the "narrow question" before it as to whether a specific federal

statute required a federal trial court to instruct the jury upon request that the failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him. The court held that an accused should be allowed to make his own choice of whether such an instruction should be given when an ". . . Act of Congress authorizes him to choose." Id., at 294. It should be noted that the federal statute [then 28 U.S.C. 632] stated an accused's failure to make a request to testify shall not create any presumption against him. The Kentucky statute, however, (Kentucky Revised Statute 421.225) states that an accused's failure to testify ". . . shall not be commented upon or create any presumption against him." It is therefore apparent that the federal statute in question in Bruno, supra, and the Kentucky statute are not similar, since the Kentucky statute specifically prohibits comment on an accused's failure to testify.

Petitioner's reliance upon Griffin v. California, supra, is similarly misplaced, since that case dealt with a problem not present herein. The court in Griffin held that a provision of the California Constitution which permitted both the prosecuting attorney and the court to comment on an accused's failure to explain or deny by his testimony any evidence or facts in the case against him was violative of the federal constitution. In the present case from Kentucky, there was no comment made on petitioner's failure to testify.[fn] In a footnote the court in Griffin, supra, specifically stated:

> We reserve decision on whether an accused can require as in Bruno v. United States . . . that the jury be instructed that his silence must be disregarded." Griffin, supra, at 615, n6.

Petitioner's reliance on Lakeside v. Oregon is equally incorrect. In Lakeside the court held that when a trial judge

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fn Petitioner makes passing comment in his brief before this Court that the prosecutor made indirect comments about petitioner's failure to testify. (Petitioner's brief p. 5.) Such a contention does not appear to be supported by the record and was not an issue presented to the Kentucky Supreme Court on appeal.

gave the instruction concerning failure to testify over the objection of a defendant, there was no error. The court noted that there has been debate over the years as to whether it is better to give a cautionary instruction of this type or whether it is better to say nothing about a defendant's silence. The court touched on the gravimen of this case by stating:

> "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each state is, of course, free to forbid its trial judges from doing so as a matter of state law. . . ." [Emphasis added]. Lakeside v. Oregon, 435 U.S. 340.

It is apparent through a reading of Lakeside v. Oregon in combination with Bruno v. United States and Griffin v. California, supra, that this court has decided to leave to the states the question of how best to handle the knotty problem of whether a jury should be instructed on a criminal defendant's failure to testify. The Commonwealth of Kentucky has determined that the best method of protecting an accused's Fifth Amendment right is to say nothing to the jury about his failure to testify. It is apparent that the intent of the general assembly of Kentucky is to insure that adverse effects from the failure to testify do not prejudice an accused. Accordingly the decision of the Kentucky Supreme Court is consistent with the federal cases on the subject.[fn2]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Supreme Court of Kentucky should be denied.

Respectfully submitted,

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fn2 It should also be noted that the jury was told by defense counsel that petitioner was not required to take the stand and testify.

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CERTIFICATE OF SERVICE

I, Robert V. Bullock, counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of August, 1980, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by placing a copy of same in the United States mail, first-class postage prepaid, and addressed to Kevin Michael McNally, Esq., Assistant Public Advocate, Office for Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601, Counsel for Petitioner.

Robert V. Bullock
Assistant Deputy Attorney General